BRIEF FOR INTERVENOR
KVOS TELEVISION CORPORATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,627

PORT ANGELES TELECABLE, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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BRIEF FOR INTERVENOR KVOS TELEVISION CORPORATION

COUNTER-STATEMENT OF THE CASE

The Counterstatement of the Case set forth in the Brief of the Respondents is adopted by Intervenor KVOS Television Corporation (hereinafter "KVOS-TV").

ARGUMENT

Intervenor adopts the Brief of the Respondents. It addresses itself herein to Petitioner's contention that KVOS-TV would not be prejudiced by a waiver of the Commission's non-duplication rule and the resultant duplication of its programs by the Port Angeles CATV system.

Preliminarily, however, certain background facts set forth in Petitioner's Brief require correction and/or clarification. Petitioner makes much of the argument that its "allegations of fact" presented to the Commission in its Petition for Waiver were supported by an affidavit, as required by the Commission Rules, but that the factual assertions contained in KVOS-TV's Opposition were not so supported. The record herein shows that, in opposition to the sparse, indeed almost frivolous, allegations of "fact"[1] in the Petition for Review, KVOS-TV incorporated by reference the exhaustive factual showing made in a then-recent, similar case, involving the waiver request of Total Telecable, Inc. (which ultimately came before this very Court on a Petition for Review of Orders of the Federal Communications Commission (Case No. 21990)). The incorporated pleadings were even served on the Petitioner. This courtesy is now rewarded by Petitioner's argument, made for the first time in its Brief (see, *e.g.*, page 17, footnote 14), that this procedure failed

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[1] The Court should note that, under the Commission's procedures, a CATV system could obtain an automatic stay of the operation of the Commission's non-duplication rule simply by filing a request for waiver of the rule within 15 days of the demand for protection by the local broadcaster. The Commission's rules prescribe no particular form for the waiver request and, as is clear from the instant case, the filing of little more than a piece of paper with the words "Petition for Waiver" thereon sufficed to bring the automatic stay provisions into effect.

to comply with the Commission's Rule 74.1109 (c) (2). This argument is wholly without merit, since neither the Commission's rules nor its stated policies preclude the cross-referencing of related factual material from one similar case to another, a procedure which serves to avoid wasteful duplication.

The above is but one small example of the many arguments made by Petitioner for the first time to the Court. Indeed, except for the factual allegations that Seattle has closer ties to Port Angeles than does Bellingham, and that waiver of the Commission's rules would not prejudice KVOS-TV (assuming that the latter can be considered a "factual" assertion), Petitioner's entire factual and legal presentation was never made at the Federal Communications Commission level. The Commission's rules expressly provided to Petitioner an opportunity to make the contentions which it now presents to the Court. Arguments as to jurisdiction, fairness, etc., could have been presented initially in the Petition for Waiver, but they were not. Section 74.1109(e) provides a period of 20 days for the submission of a reply to comments or oppositions concerning requests for waiver of the rules, but Petitioner completely failed to take advantage of that opportunity. Finally, the Commission's rules (Section 1.106) provide for the filing of Petitions for Reconsideration of final Commission actions. Again, Petitioner ignored this opportunity to afford the Commission a chance to pass, in the first instance and as the appropriate forum, on its diverse allegations and arguments.

Petitioner also questions the Commission's failure to condition, and KVOS-TV's failure to contest, the grant of a license to KIRO-TV for a television broadcast translator station to operate in Port Angeles, rebroadcasting the programs of KIRO-TV in Seattle. The short answer to Petitioner's suggestion that KVOS-TV accedes to the translator operation because this incursion into its market is made by a "fellow

broadcaster" is that, in similar circumstances, KVOS-TV *has* petitioned the Commission to deny, designate for hearing, or condition the proposed television translator operation of KIRO-TV in Anacortes, Washington. That Petition to Deny, filed on April 6, 1965, was granted, in substance, by the Commission's Memorandum Opinion and Order of May 26, 1965, *KIRO, Inc.*, FCC 65-468, 5 Pike & Fischer R.R.2d 313 (1965). Even more importantly, Petitioner fails to advise this Court that the translator to which it has reference is a UHF translator, and that in the Second Report and Order, the Commission specifically dealt with the question of non-duplication protection for VHF television stations vis-a-vis UHF translators. "In view of [its] policy of encouraging UHF", the Commission decided not to impose non-duplication conditions on UHF translator grants for facilities to operate in an all-VHF area. Second Report and Order, paragraph 86a, 2 FCC2d 725, 759 (1966).

THE COMMISSION'S BALANCE OF CATV AND BROADCASTING INTERESTS IS REASONABLE AND PROPER

The basis of the Commission's non-duplication rule has been set forth in a number of briefs filed by the Commission and by other parties in this Court. See, *e.g.*, Respondents' Brief in *Total Telecable, Inc. v. Federal Communications Commission and United States of America,* Case No. 21990; and Respondents' Brief and Brief for Intervenors in *Great Falls Community TV Cable Co., Inc. v. Federal Communications Commission and United States of America,* Case No. 22393. Briefly, the Commission, having considered voluminous comments in an appropriate rule-making proceeding, concluded that the non-duplication rule was required to permit CATV to complement the broadcast services by making available a greater choice of programming and, at the same

time, to remove the threat that unfettered CATV growth would destroy local television service, with its valuable service to rural areas.

The validity of the Commission's approach becomes manifest when viewed in the context of its overall scheme of national television allocations. Channels are assigned to various communities in the United States in a Table of Allocations, set forth in Section 73.606 of the Commission's Rules. The Commission's assignment of a channel to Bellingham, and the operation of KVOS-TV, would be greatly frustrated if, for example, eight television stations were authorized to operate in Port Angeles or, more particularly, if a television station operating in Port Angeles were permitted to duplicate the programs of KVOS-TV. Yet, the operation of the Port Angeles CATV system has essentially the same effect on KVOS-TV's assignment, unless the Commission's non-duplication rule is brought into play to restore the situation to something approaching normalcy.

Petitioner points out (Brief, p. 54) that, under the Commission's Rules, a television station can bargain for exclusive distribution of television network programs only in its principal community. However, this revelation totally obscures the relevant fact that the local station's network rate is based upon the size of its audience in all of the television homes located throughout its service area. In this case, Port Angeles is located within KVOS-TV's service area, indeed within its Grade A service area, and it is important to understand that Petitioner's pirating of the same programs from a Seattle source, and its dissemination by wire of those programs into the television homes located within KVOS-TV's natural orbit, significantly threaten the viability of KVOS-TV's operation. In essence, Petitioner's CATV system engages in exactly the kind of unfair and harmful competition which the Commission's non-duplication rule is designed to avoid.

At no time, either before the Commission or before this Court, has Petitioner met its burden of showing how the Northwest Washington situation respecting its CATV operation within the Grade A service area of KVOS-TV differs in any significant way from the usual situation envisioned by the Commission in its promulgation of the rule in question. The conclusionary allegations that Port Angeles has some kind of closer affinity to Seattle than to Bellingham and that KVOS-TV derives a portion of its revenue from its Canadian audience are, as the Commission properly found, irrelevant and unpersuasive. The fact remains that KVOS-TV's network rate is calculated on the basis of the size of its American audience. That audience includes Port Angeles and it is fragemented and diluted to the extent that Petitioner carries, on the same day, the exact same programs as are broadcast by KVOS-TV. Moreover, this Court, appropriately, can and should take notice of the fact that Petitioner's system is not the only one operating within the KVOS-TV service area. See *Total Telecable, Inc. v. Federal Communications Commission and United States of America, supra.* The cumulative effect of these CATV incursions into KVOS-TV's service area is a matter of legitimate concern and it supports the propriety of the Commission's determination that the overall television structure should not be threatened as a consequence of piece-meal consideration of ad hoc cases. Compare *Interstate Broadcasting Co., Inc. v. Federal Communications Commission,* 109 U.S. App. D.C. 190, 285 F.2d 270 (1960); *Id.,* 109 U.S. App. D.C. 260, 286 F.2d 544 (1960).

The Commission's non-duplication rules do not operate to deprive the public of any programs[2] broadcast by the Seattle stations, since the rules only require the deletion of the identical programs which are broadcast over KVOS-TV. There is, consequently, no significant loss of programs to the public. This fact underscores the validity of the Commission's balance of the conflicting interests of CATV and broadcasting and supports the affirmance of the Commission's order in this case.

Respectfully submitted,

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[2] It is important for the Court to consider that the Rule is designed to avoid the duplication of *programs* carried over the CATV system in the 24-hour period during which the same programs are broadcast by the protected, local television station. It may well be, as Petitioner suggests, that "some" commercial announcements are caught up in the blackout requirement. However, it is clear that this is merely an incidental concomitant of the thrust of the Commission's Rule; indeed, even Petitioner could not delineate the extent to which such commercial deletions would result from enforcement of the Commission's Rule.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ PAUL DOBIN